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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

MARTIN BECKNER, Plaintiff and Appellant, v. CITY OF SAN MARCOS, Defendant and Respondent.	D036797 (Super. Ct. No. GIN003751)

APPEAL from a judgment of the Superior Court of San Diego County, Thomas P. Nugent, Judge. Affirmed.

Plaintiff Martin Beckner appeals a judgment of dismissal entered after the court sustained, without leave to amend, a general demurrer filed by Beckner's former employer, defendant City of San Marcos (the City), to Beckner's first amended complaint for age discrimination under the Age Discrimination in Employment Act of 1967 (29 U.S.C. § 621, et seq. (ADEA)) and the Fair Employment and Housing Act (Gov. Code,[1]

§ 12900 et seq. (FEHA)), wrongful termination in violation of public policy and other related claims. The court ruled, among other things, that Beckner was collaterally estopped from litigating the propriety of his termination in the instant action because that issue was litigated and decided against him in his administrative appeal and petition to the superior court for a writ of mandate. Beckner contends the court erred in applying the doctrine of collateral estoppel because (1) he did not have a full and fair opportunity to present his claims in the mandamus proceeding; (2) application of collateral estoppel violated the Supremacy Clause of the federal Constitution; (3) application of collateral estoppel deprived him of his right to a jury trial under the state and federal constitutions; and (4) his action seeks relief for conduct that was not addressed in the mandamus proceeding. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On appeal of a judgment of dismissal entered after the sustaining of a demurrer without leave to amend, we accept as true all the material allegations of the complaint, reasonable inferences that can be drawn from those allegations and facts that may properly be judicially noticed. (*Crowley* v. *Katleman* (1994) 8 Cal.4th 666, 672; *Saks v. Damon Raike & Co.* (1992) 7 Cal.App.4th 419, 422 (*Saks*).) However, we will not accept conclusions of fact or law as true and will disregard any allegations that are contrary to the law or to a fact of which we have taken judicial notice. (*Interinsurance Exchange v. Narula* (1995) 33 Cal.App.4th 1140, 1143.) The following facts are alleged

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1 All statutory references are to the Government Code unless otherwise specified.

in Beckner's first amended complaint or established by matters of which we take judicial notice.[2]

Beckner was hired as a fire captain with the City in March 1990. During his employment, Beckner earned strong performance reviews, received awards, commendations and raises, and had no disciplinary problems. In October 1998, while still working for the City, Beckner filed age discrimination claims with the Department of Fair Employment and Housing (DFEH) and the Equal Employment Opportunity Commission (EEOC) and received right-to-sue letters on those claims from both agencies. In March 1999, the city manager terminated Beckner's employment. At that time, Beckner was over the age of forty. Beckner filed a second claim with DFEH addressing his termination and received a right-to-sue letter from DFEH regarding that claim.

According to Beckner's verified petition for writ of mandate, Beckner appealed his termination to the city manager, who acted as the hearing officer in the administrative appeal and upheld the termination. In September 1999, Beckner filed a petition for writ of mandamus in superior court challenging the city manager's decision. The court denied the petition in February 2000, and entered judgment for the City.

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[2] We take judicial notice of Beckner's Verified Petition for Writ of Mandamus in *Beckner v. Gitting et al.*, GIN001345; the Superior Court's February 3, 2000 order denying the petition; and the March 14, 2000 Judgment denying Beckner's peremptory writ. (Evid. Code, § 459.)! The City requested and the trial court presumably granted judicial notice of these documents.

Beckner filed his first amended complaint (the complaint) in the instant action in January 2000, while his petition for writ of mandate was still pending. The City filed a demurrer challenging each of the seven causes of action in the complaint and a motion to strike the portions of the complaint relating to punitive damages. Beckner filed a "statement of nonopposition" to the motion to strike and consented to the dismissal of his fourth, fifth and seventh causes of action for breach of contract, breach of the implied covenant of good faith and fair dealing, and negligent hiring and supervision, respectively. He opposed the demurrer as to his first and second causes of action under the ADEA and FEHA, respectively, his third cause of action for wrongful termination in violation of public policy and sixth cause of action for retaliation. The court entered a judgment of dismissal after sustaining the City's demurrer without leave to amend on the ground the instant action is barred by the doctrine of collateral estoppel. In addition to ruling that the mandamus judgment collaterally estopped Beckner from litigating issues that were actually litigated and determined in the mandamus proceeding, the court ruled that Beckner's age discrimination theory was barred because Beckner did not raise it in the mandamus proceeding.

DISCUSSION

Standard of Review

On appeal of a judgment of dismissal entered after the sustaining of a demurrer without leave to amend, we review the complaint de novo to determine whether it states a cause of action under any legal theory. (*Rakestraw v. California Physicians' Service* (2000) 81 Cal.App.4th 39, 43.) A court may sustain a general demurrer based on res

judicata when the facts showing the doctrine applies are within the allegations of the complaint or matters subject to judicial notice. (*Frommhagen v. Board of Supervisors* (1987) 197 Cal.App.3d 1292, 1299.) "In ruling on a demurrer based on res judicata, a court may take judicial notice of the official acts or records of any court in this state. [Citations.]" (*Ibid*.)

Res Judicata and Collateral Estoppel

Under the doctrine of res judicata, a valid final judgment on the merits in a defendant's favor bars further litigation on the same cause of action. (*Takahashi* v. *Board of Education* (1988) 202 Cal.App.3d 1464, 1473 (*Takahashi*).) Collateral estoppel, a secondary aspect of res judicata, bars a party from litigating matters that were litigated and determined in a prior proceeding. (*Id*. at pp. 1473-1474.) The bar against further litigation on the same cause of action is referred to as "claim preclusion" and the collateral estoppel aspect of res judicata is referred to as "issue preclusion." (*Mata* v. *City of Los Angeles* (1993) 20 Cal.App.4th 141, 149, fn. 7 (*Mata*).)

To determine the scope of causes of action for purposes of claim preclusion, "California courts employ the 'primary rights' theory. Under this theory, the underlying right sought to be enforced determines the cause of action. In determining the primary right, 'the significant factor is the harm suffered.' [Citation.]" (*Takahashi* v. *Board of Education*, *supra*, 202 Cal.App.3d at p. 1474.)

Here, although the court sustained the City's demurrer under the doctrine of "collateral estoppel," it also applied the doctrine of *claim* preclusion in ruling that Beckner's age discrimination theory was barred because it could have been litigated in the

mandamus proceeding.[3] "It is axiomatic that a final judgment serves as a bar not only to the issues litigated but to those that could have been litigated at the same time. In *Sutphin* v. *Speik* (1940) 15 Cal.2d 195, 202, the California Supreme Court stated the rule regarding the scope of res judicata as follows: 'If the matter was within the scope of the action, related to the subject matter and relevant to the issues, so that it *could* have been raised, the judgment is conclusive on it despite the fact that it was not in fact expressly pleaded or otherwise urged. The reason for this is manifest. A party cannot by negligence or design withhold issues and litigate them in consecutive actions. Hence the rule is that the prior judgment is *res judicata* on matters which were raised or could have been raised, on matters litigated or litigatable. [Citations.]' " (*Takahashi* v. *Board of Education, supra,* 202 Cal.App.3d at p. 1481, original italics.) Accordingly, Beckner's ADEA, FEHA, wrongful termination in violation of public policy, and retaliation claims are barred under the doctrine of claim preclusion if they involve the same primary right as the prior mandamus proceeding or issues that could have been raised in that proceeding.

Our comparison of the primary rights involved in Beckner's mandamus proceeding and the instant action is guided by *Takahashi* v. *Board of Education, supra,* 202 Cal.App.3d 1464. The plaintiff in *Takahashi* was a tenured teacher who was dismissed by the defendant school district for incompetency after an administrative hearing. (*Id.* at

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3 *Issue* preclusion or collateral estoppel applies only to issues that were actually litigated and decided in the first action (*Mata* v. *City of Los Angeles, supra,* 20 Cal.App.4th at pp. 148-149), not to issues that could have been but were not decided.

pp. 1468-1470.) The plaintiff challenged her termination by filing a petition for writ of mandate in superior court against the school board and related defendants. The court denied the petition and the denial was affirmed on appeal. (See *California Teachers Assn.* v. *Governing Board* (1983) 144 Cal.App.3d 27.) The plaintiff then filed an action in federal court for damages and injunctive relief based on United States Code sections 1981 and 1983, and two separate actions in state court alleging a variety of wrongful termination theories. (*Takahashi* v. *Board of Education, supra,* 202 Cal.App.3d at pp. 1471-1472.) The federal district court ruled that the federal action was precluded by the superior court mandamus proceeding and the United States Court of Appeals affirmed that decision. (*Id.* at p. 1471.) In the consolidated state court actions the trial court granted the defendants' motion for summary judgment on the ground the actions were barred under the doctrine of res judicata by the prior mandamus proceeding in state court and the federal court action. (*Id.* at pp. 1472-1473.)

In affirming the summary judgment, *Takahashi* followed the federal appellate court's primary rights analysis and conclusion that the plaintiff's petition for writ of mandate and later civil actions were based on the invasion of the same primary right, namely, plaintiff's contractual right to employment by the district (*Takahashi* v. *Board of Education, supra,* 202 Cal.App.3d at pp. 1475.) Noting that all of the plaintiff's causes of action in the consolidated state court actions arose "in conjunction with or as a result of the alleged wrongful termination of her employment" (*id*. at p. 1476), *Takahashi* concluded: "Since it has been finally determined through the writ procedure and through the appellate procedure that the district was entitled to dismiss plaintiff on the basis of

incompetence, that judgment is binding as to all issues regarding that termination that were raised or could have been raised." (*Id.* at p. 1482.)

Likewise, the instant action involves the same primary right that was at stake in Beckner's prior mandamus proceeding. Beckner sought reinstatement of his employment with the City in his petition for a writ of mandate. His complaint in the instant action seeks damages arising from the alleged wrongful termination of his employment, including "loss of income and benefits, back pay, [and] front pay . . . ." The primary right asserted in both proceedings is Beckner's right to continued employment by the City. Although Beckner's complaint includes conclusory allegations of age discrimination, an "ageist work environment," a "hostile work environment because of [Beckner's] age," "discriminatory and/or harassing conduct" and retaliation, the only adverse employment action specified in the body of the complaint is Beckner's termination. The injuries alleged in Beckner's complaint are the monetary damages flowing from the termination. and the emotional distress Beckner suffered as a result of the alleged hostile work environment, discrimination and retaliation. Beckner's alleged mental distress does not support a separate cause of action for res judicata purposes because it is not a separate harm but merely a consequence of the City's alleged invasion of his right to employment. (*Takahashi* v. *Board of Education, supra,* 202 Cal.App.3d at p. 1475.)

Because the court determined through the mandamus procedure that the City's termination of Beckner's employment was proper, the judgment in the mandamus proceeding is binding as to all issues regarding Beckner's termination that were raised or could have been raised in that proceeding. Beckner's complaint raises no issue that could

not have been raised in the mandamus proceeding. His ADEA, FEHA, wrongful termination and retaliation claims, which include conclusory allegations of discrimination, hostile work environment and retaliation, all arose in conjunction with or as a result of the alleged wrongful termination of his employment[4] and could have been raised in the mandamus proceeding to controvert the City's position that Beckner was terminated for cause. Having elected not to raise those claims in the mandamus proceeding, Beckner is barred by res judicata from litigating them in the instant action. (*Takahashi* v. *Board of Education, supra,* 202 Cal.App.3d at p. 1482.

Beckner cites *Mata* v. *City of Los Angeles, supra,* 20 Cal.App.4th 141, for the proposition that a judgment on a superior court mandamus proceeding can have no res judicata effect on a later civil action because a mandamus proceeding is a "special proceeding" as opposed to an "action." In *Mata* the appellant, a discharged police officer, combined his petition for a writ of mandate challenging his termination with various causes of action under 42 United States Code section 1983. The trial court granted the writ of mandate and later granted defendants' motion for summary judgment on the 1983 claims on the ground the appellant was collaterally estopped from pursuing those claims

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4 Beckner's pre-termination claim of age discrimination was directly related to his ultimate wrongful termination claim. The initial claim Beckner filed with both DFEH and EEOC was based on an allegedly unfair and untrue performance evaluation he received in March 1998. According to Beckner's petition for writ of mandate, the termination notice he received from the City in March 1999 was based on his failure to comply with the directive in the March 1998 performance evaluation that he would be terminated if he failed to "improve his operational ability and interpersonal skills."

by his successful pursuit of the writ of mandate. (*Mata* v. *City of Los Angeles, supra,* at p. 146.)

Concluding that the appellant's 42 United States Code section 1983 claims were not barred by the doctrine of claim preclusion, *Mata* stated: "In this case the 'second suit,' i.e., the 42 United States Code section 1983 action, is on a different cause of action. In fact, the mandamus proceeding is technically not an action at all. It is, instead, described as a special proceeding. [Citation.] Therefore, appellant's [42 United States Code] section 1983 action is not barred by the doctrine of claim preclusion. [Citations.]" (*Mata* v. *City of Los Angeles, supra,* 20 Cal.App.4th at p. 149.) *Mata* seems to reason that because cases discussing the claim preclusion aspect of res judicata sometimes refer to the second suit as involving the same or a different "cause of action," only "actions," as opposed to "special proceedings" can have claim-preclusive effect.[5]

Mata places unwarranted significance on the use of the term "cause of action" in reference to the res judicata effect of final judgments. As *Takahashi* illustrates, the essential query in determining whether the doctrine of claim preclusion bars a later proceeding is not whether the first proceeding was an "action" as opposed to a "special proceeding," but whether the same primary rights are sought to be enforced in both

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5 Code of Civil Procedure section 21 divides judicial remedies into two categories: actions and special proceedings. Code of Civil Procedure section 22 defines an "action" as "an ordinary proceeding in a court of justice by which one party prosecutes another for the declaration, enforcement, or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense." Code of Civil Procedure section 23 provides: "Every other remedy is a special proceeding."

proceedings.[6] There is no reason a judgment on a "special proceeding" to enforce a primary right should be any less claim preclusive than a judgment on an "action" to enforce that right. If the primary right sought to be enforced in a particular proceeding is the same as that involved in an earlier proceeding, and the claims asserted in the second proceeding could have been brought in the first proceeding, the doctrine of claim preclusion applies regardless whether the first proceeding was an "action" or a "special proceeding." To the extent *Mata* holds that a judgment on a petition for writ of mandate cannot result in claim preclusion, we decline to follow it.

Opportunity to Present Claims in Mandamus Proceeding

Beckner contends his present claims should not be barred by res judicata because he did not have a full and fair opportunity to present them in the mandamus proceeding. He argues he was unable to do so because he had not yet received all of the requisite right-to-sue letters from DFEH. Presumably, Beckner is referring to the fact that he filed his petition for writ of mandate in September 1999, and did not receive the right-to-sue letter from DFEH regarding his discriminatory and retaliatory discharge claim until December 1999.

The issue in Beckner's administrative appeal and mandamus proceeding was whether there was good cause for his discharge. Beckner did not need a right-to-sue

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6 The term "proceeding" refers broadly to both judicial actions and special proceedings, as well as proceedings before quasi-judicial officers and administrative boards. (*Exxess Electronixx* v. *Heger Realty Corp*. (1998) 64 Cal.App.4th 698, 712, fn. 15.)

letter from DFEH to attempt to show in the administrative and mandamus proceedings that he was unlawfully discharged for discriminatory and retaliatory reasons and not for the reasons asserted by the City. *Takahashi* noted that the plaintiff in that case had the right and power under Government Code sections 11505 and 11506 (of the Administrative Procedure Act) "to assert any defense to the incompetency charge, including defenses based on allegations that her constitutional and civil rights were being violated by defendants' actions." (*Takahashi* v. *Board of Education, supra,* 202 Cal.App.3d at pp. 1476-1477, 1484.) Although the Administrative Procedure Act (Gov. Code, §§ 11500 et seq.) may not apply to the City, the quoted language in *Takahashi* illustrates that a public employee has the right to assert discriminatory or other wrongful conduct by the employer as a defense to termination (or other adverse employment action) in administrative proceedings and mandamus review of administrative findings. We are aware of no authority that would require an employee to obtain a right-to-sue letter from DFEH or EEOC before asserting a defense to a for-cause termination in administrative and mandamus proceedings. The requirement of a right-to-sue letter is part of the requirement that administrative remedies be exhausted before filing a civil action. A public employee is not required to exhaust administrative remedies provided by the DFEH or EEOC before seeking judicial review of findings made in some other administrative arena. Beckner could have asserted his present claims against the City in the mandamus proceeding

Supremacy Clause

Beckner contends the trial court's application of collateral estoppel violated the Supremacy Clause of the federal Constitution by creating a conflict between California and federal law. Beckner notes that under the ADEA an aggrieved employee can file an action in either state or federal court. He asserts, however, that under California law the employee is required to bring a mandamus action before bringing a civil rights action. Since the mandamus proceeding must be brought in state court, Beckner argues the employee loses the right afforded by the ADEA to file an action in federal court if the judgment in the mandamus proceeding is held to bar a subsequent civil action under the doctrine of res judicata.

Beckner's argument is without merit. Under California law, an employee is *not* required to bring a mandamus action before bringing a civil rights action. Beckner's assertion to the contrary reflects a misunderstanding of the so called "requirement of exhaustion of judicial remedies." In *Johnson v. City of Loma Linda* (2000) 24 Cal.4th 61, 65 (*Johnson*), the California Supreme Court held that agency findings in a quasi-judicial administrative proceeding are binding in later civil actions unless they are successfully challenged in a mandamus proceeding in superior court. *Johnson* distinguished the requirement of exhaustion of *judicial* remedies from the requirement of exhaustion of *administrative* remedies, noting the latter is a jurisdictional prerequisite to a later action whereas the former concerns the binding effect of an administrative agency's decision where an aggrieved party failed to overturn it in a mandamus proceeding. (*Id*. at p. 70.) In her concurring opinion in *Johnson*, Justice Werdegar further clarified that an aggrieved

party who fails to seek mandamus review of an administrative agency's decision is not *procedurally barred* from bringing a later civil action, but rather is bound by the agency's fact findings. (*Id*. at p. 81, conc. opn. of Werdegar, J.)

Beckner's procedural right to file an ADEA action in either federal or state court remained intact after the court rendered judgment in his mandamus proceeding. That the later action was subject to a res judicata defense does not mean Beckner was denied his right to file the action in federal court. Res judicata is a defensive plea and does not affect the court's jurisdiction. (*Lincoln v. Superior Court* (1943) 22 Cal.2d 304, 308, disapproved on another point in *Robinson v. Superior Court* (1950) 35 Cal.2d 379, 386-387.) As *Takahashi* illustrates, federal courts as well as state courts apply res judicata to state administrative and mandamus proceedings. (See *Takahashi* v. *Board of Education, supra*, 202 Cal.App.3d at p. 1471; *McDaniel v. Board of Education* (1996) 44 Cal.App.4th 1618, 1622 [federal courts give state agency fact-finding the same preclusive effect it would have in state courts].) The court's application of res judicata did not violate the Supremacy Clause.

Right to a Jury Trial

Beckner contends the trial court's application of res judicata conflicts with his statutory right to a jury trial under the ADEA (29 U.S.C. § 626, subd. (c)(2)) and violates his state and federal constitutional rights to a jury trial.

" '[A]ny right to a jury trial . . . is only a right to submit to a jury issues of fact which are triable. When issues of fact have been conclusively resolved . . . in a prior action, application of collateral estoppel to take those issues from the jury does not

violate the right to trial by jury.' [Citation.]" (*Estate of Baumann* (1988) 201 Cal.App.3d 927, 934, fn. 9, citing *People v. Sims* (1982) 32 Cal.3d 468, 483-484, fn. 13 [application of collateral estoppel to take from the jury issues that have been conclusively resolved against the state in a prior administrative action does not violate the state's right to a jury trial].) Nor, in our view, is the right to a jury trial infringed by application of res judicata to take from the jury issues that *could have been* raised in a prior action. (*Takahashi* v. *Board of Education, supra,* 202 Cal.App.3d at p. 1481.) Whether statutory or constitutional, the right to a jury trial extends only to triable issues of fact and thus does not extend to issues that were or could have been conclusively decided in a prior proceeding.

Under Beckner's argument, the right to a jury trial would be violated whenever an administrative agency's factual findings are given res judicata effect in a later action in which the right to a jury trial would otherwise apply. It is settled, however, that administrative adjudication of a matter properly within a agency's regulatory power does not violate the constitutional right to a jury trial. (*Ford v. Pacific Gas & Electric Co.* (1997) 60 Cal.App.4th 696, 707.) As explained in *McHugh v. Santa Monica Rent Control Bd.* (1989) 49 Cal.3d 348, 372, 380, the state constitutional right to a jury trial is not infringed by an administrative adjudication as long as the agency's exercise of its adjudicative power "meets the 'substantive limitations' requirement imposed by the state's judicial powers doctrine -- i.e. [the agency's actions] are authorized by statute or legislation, and are reasonably necessary to, and primarily directed at effectuating the agency's primary, legitimate regulatory purposes . . . ." Here, there is no argument or

indication in the record that the City's administrative review of Beckner's termination was not authorized or within the City's regulatory power.

That the factual findings in Beckner's mandamus case were made by a hearing officer and upheld by a judge does not render the application of res judicata to those findings a violation of Beckner's right to a jury trial. "[M]andamus . . . is an equitable proceeding designed to achieve justice where no other remedy is available. [Citation.]" (*Windigo Mills v. Unemployment Ins. Appeals Bd.* (1979) 92 Cal.App.3d 586, 596.) It is a "long-accepted principle that a non-jury adjudication of issues asserted in a equitable claim will collaterally estop a later jury trial of the same issues presented by the same party in a legal claim." (*Shore v. Parklane Hosiery Company, Inc.* (2d Cir. 1977) 565 F.2d 815, 820.) The court's application of res judicata did not violate Beckner's right to a jury trial.

Issues Not Addressed in the Mandamus Proceeding

Finally, Beckner contends we should reverse even if the mandamus judgment has a preclusive effect because the court in the mandamus proceeding did not address his allegations of discrimination before he was terminated. As noted, the complaint's allegations of age discrimination are conclusory. Other than Beckner's termination, the only specific act of discrimination alleged (through an attached exhibit) is a negative performance evaluation, which could have been addressed in the mandamus proceeding because it directly related to the termination. (*Ante*, fn. 4.) As we also noted, the only injury alleged, apart from the damages caused by his termination, is the emotional distress he suffered as a result of unspecified discrimination, harassment and retaliation.

We reiterate that Beckner's alleged emotional distress does not support a separate cause of action under res judicata analysis because it is not a separate harm but merely a consequence of the City's alleged invasion of his right to employment. (*Takahashi* v. *Board of Education, supra,* 202 Cal.App.3d at p. 1475.) Beckner's complaint raises no issue that could not have been raised in the mandamus proceeding.

DISPOSITION

The judgment is affirmed.

O'ROURKE, J.

WE CONCUR:

NARES, Acting P. J.

McINTYRE, J.